

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

No. 2:08-CR-06088-EFS-1

Plaintiff,

ORDER DENYING DEFENDANT'S MOTION  
TO VACATE CONVICTION AND FOR  
IMMEDIATE RELEASE

JUAN PACO CAMPOS,

Defendant.

Before the Court is Defendant Juan Paco Campos's Motion to Vacate  
Conviction in Light of *Johnson v. United States*, 135 S. Ct. 2551 (2015)  
and for Immediate Release, ECF No. 72. On August 16, 2016, the Court  
held a hearing on this matter. See ECF No. 82. Ms. Alison Guernsey  
appeared on behalf of Mr. Campos, who was not present for the hearing,  
and Mr. Thomas J. Hanlon appeared on behalf of the United States  
Attorney's Office (USAO). See ECF No. 82. After taking the matter under  
advisement, the Court denies Mr. Campos's Motion for the reasons  
articulated below.

## I. FACTUAL BACKGROUND

In November 2008, the USAO filed an indictment containing two charges. Count 1 alleged Mr. Campos "did unlawfully take and obtain property consisting of United States Currency, from S.K., an employee of Lucky Food Mart against her will by means of actual and threatened

1 force, violence, and fear of injury, immediate and future, to her  
2 person; all in violation of Title 18, United States Code, Section 1951"  
3 (Hobbs Act Robbery). ECF No. 1. Count 2 alleged Mr. Campos knowingly  
4 discharged a firearm "during and in relation to a crime of violence for  
5 which he maybe [sic] prosecuted in a court of the United States, that  
6 is, Interference with Commerce by Robbery, in violation of Title 18,  
7 United States, Section 1951; all in violation of Title 18, United States  
8 Code, Section 924(c)(1)(A)." ECF No. 1.

9       In August 2009, Mr. Campos entered a plea agreement based on the  
10 following agreed-upon facts:

11           On September 22, 2008, the Defendant entered the Lucky  
12 Food Mart . . . a convenience store [that] provides goods  
13 for sale. The goods which are provided for sale travel in  
14 interstate commerce.

15           The Defendant approached the store clerk and brandished  
16 a firearm. The Defendant demanded that the store clerk hand  
17 over money from the register. The store clerk glanced at  
18 the Defendant, looked down, and failed to open the register.  
19 The Defendant then pointed his firearm at the counter and  
20 discharged a round. The round struck the front counter. The  
21 store clerk then immediately emptied the cash drawer which  
22 contained less than three-hundred dollars. The store clerk  
23 handed the money to the Defendant. The Defendant then  
24 quickly exited the store, entered his vehicle, and left the  
25 area. The entire incident was captured on video tape.

26           . . . [Police] stopped the vehicle and apprehended the  
27 Defendant. Shortly after the arrest, the Defendant was  
28 advised of his Miranda rights. The Defendant waived his  
29 rights and agreed to speak with the law enforcement officers.  
30 The Defendant stated that he had a fight with his girlfriend.  
31 The Defendant stated that he then went to a friend's house  
32 to obtain cocaine. The Defendant stated that he was unable  
33 to complete the cocaine deal, so he went the Lucky Food Mart  
34 and committed a robbery. The Defendant stated that he then  
35 hid the firearm at the home of his friend.

36           ECF No. 45.

37           /

1 Pursuant to the plea agreement, Mr. Campos pled guilty to Count  
2, using a firearm in a crime of violence; the USAO moved to dismiss  
3 Count 1, the underlying Hobbs Act Robbery charge; and both parties  
4 recommended the mandatory minimum sentence of 10 years' imprisonment.  
5 ECF Nos. 45, 49 & 51. Finding it to be sufficient but not greater than  
6 necessary to serve the goals and purposes of sentencing, the Court  
7 imposed a 10-year sentence, noting that "Defendant is an admitted gang  
8 member and committed this very serious offense during which he fired a  
9 weapon in the direction of an innocent person." ECF Nos. 57 & 58.

10 Mr. Campos now believes he is serving an illegal and  
11 unconstitutional sentence. ECF No. 72 at 28. He filed this Motion  
12 pursuant to 28 U.S.C. § 2255, and is asking the Court to vacate his  
13 sentence and order that he be released. ECF No. 72 at 28.

14 **II. ANALYSIS**

15 **A. Defendant's Collateral Attack Waiver**

16 As a preliminary matter, the Court considers and rejects the USAO's  
17 position that Mr. Campos waived the right to bring this Motion in the  
18 first place. See ECF No. 77 at 2-3. Mr. Campos's plea agreement did  
19 include a provision that waived his right to appeal or collaterally  
20 attack his sentence pursuant to 28 U.S.C. § 2255. See ECF No. 45 at 8.  
21 Such appeal waivers, however, are not applicable when a defendant's  
22 sentence violates the Constitution. See *United States v. Bibler*, 495  
23 F.3d 621, 624 (9th Cir. 2007). As Mr. Campos attacks his sentence and  
24 underlying conviction on constitutional grounds, the Court will address  
25 the merits of his arguments.

26 /

1       **B. Categorical Approach**

2       For Mr. Campos's conviction and sentence to stand, he must have  
 3       discharged a firearm during and in relation to a "crime of violence."<sup>1</sup>  
 4       See 18 U.S.C. § 924(c)(1)(A)(iii). To determine whether Hobbs Act  
 5       Robbery constitutes the requisite underlying crime of violence, the  
 6       Court looks to the "categorical approach" as laid out in *Taylor v.*  
 7       *United States*, 495 U.S. 575 (1990). See *United States v. Benally*, No.  
 8       14-10452, 2016 WL 4073316, at \*2 (9th Cir. Aug. 1, 2016). Under this  
 9       approach, the Court cannot look to the particular facts surrounding the  
 10      conviction, but must instead "compare the elements of the statute  
 11      forming the basis of the defendant's conviction with the elements of"  
 12      a crime of violence. *Id.* (quoting *Descamps v. United States*, 133 S. Ct.  
 13      2276, 2281 (2013)). Thus, to categorically be a crime of violence under  
 14      § 924(c), Hobbs Act Robbery cannot punish any conduct that falls outside  
 15      § 924(c)(3)'s definition. See *Benally*, 2016 WL 4073316, at \*2.

16       **C. Definition of "Crime of Violence"**

17       As relevant here, "crime of violence" is defined by 18 U.S.C.  
 18      § 924(c)(3):

19               [T]he term "crime of violence" means an offense that is a  
 20               felony and--

---

21  
 22       <sup>1</sup> Notably, the statutory language does not appear to require that the  
 23       defendant have been convicted – or even charged – with a crime of violence.  
 24       See 18 U.S.C. § 924(c)(1)(A) (applying to "any person who, during and in  
 25       relation to any crime of violence . . . for which the person may be  
 26       prosecuted in a court of the United States, uses or carries a firearm")  
 26       (emphasis added). However, the Court does not reach whether this  
 26       distinction is relevant, as neither party addressed the issue.

- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Mr. Campos argues that § 924(c)(3)(B) – the “risk-of-force clause” – suffers from the same constitutional infirmities for which the Supreme Court struck the Armed Career Criminal Act’s residual clause in *Johnson v. United States* (*Johnson II*), 135 S. Ct. 2551 (2015). This Court, however, need not decide whether *Johnson II* renders the risk-of-force clause unconstitutionally vague. Instead, it is sufficient that the Court finds Hobbs Act Robbery qualifies as a crime of violence under § 924(c)(3)(A) – the “element-of-force clause.”<sup>2</sup>

#### D. The "Physical Force" Requirement

According to Mr. Campos, the Hobbs Act definition of robbery is too broad to match § 924(c)(3)'s element-of-force clause under the categorical approach. See ECF No. 72 at 9. Specifically, he asserts that Hobbs Act Robbery might be committed without using or threatening "physical force" as required by § 924(c)(3), and posits that Hobbs Act Robbery does not require sufficiently "violent" force in light of *Johnson v. United States (Johnson I)*, 559 U.S. 133 (2010). He also hypothesizes that by placing another in fear of injury to property,

<sup>2</sup> The parties refer to § 924(c)(3)(A) and (B) as the "force clause" and the "residual clause," respectively. See ECF Nos. 72 & 77. However, the Court believes the terms "element-of-force clause" and "risk-of-force clause" to be more accurate and precise.

1 threatening to poison someone, or by using "minimal force," a defendant  
2 might commit Hobbs Act Robbery without needing to threaten or use such  
3 physical force. ECF No. 72 at 11-16.

4       1. **Applicability of Johnson I**

5       In *Johnson I*, the Supreme Court held that "physical force" – in  
6 the context of defining "violent felony" under § 924(e)(2)(B)(i) – means  
7 "violent force – i.e., force capable of causing physical pain or injury  
8 to another person." *Johnson I*, 559 U.S. at 138. Even assuming the  
9 *Johnson I* definition of physical force applies here, however, the  
10 statutory language, Ninth Circuit case law, and decisions from other  
11 jurisdictions make it clear that Hobbs Act Robbery nonetheless  
12 constitutes a crime of violence under § 924(c)(3)'s element-of-force  
13 clause.

14       2. **The Statutory Language**

15       The statutory language strongly suggests that the type of force  
16 required to commit Hobbs Act Robbery qualifies as "physical force" under  
17 § 924(c)(3)'s element-of-force clause. After all, the Hobbs Act has  
18 its own specific definition of "robbery" in 18 U.S.C. § 1951(b)(1):

19       The term "robbery" means the unlawful taking or obtaining of  
20 personal property from the person or in the presence of  
21 another, against his will, by means of actual or threatened  
22 force, or violence, or fear of injury, immediate or future,  
23 to his person or property, or property in his custody or  
24 possession, or the person or property of a relative or member  
25 of his family or of anyone in his company at the time of the  
26 taking or obtaining.

27       This definition is flush with terms that connote close physical  
28 proximity and violence; in context, the statute's "actual or threatened  
29

1 "force" or "fear of injury" are clearly envisioned as physical in nature.<sup>3</sup>  
 2 *Cf.* Black's Law Dictionary (10th ed. 2014) (defining "force" as  
 3 "[p]ower, violence, or pressure directed against a person or thing" and  
 4 defining both "actual force" and "physical force" as "[f]orce consisting  
 5 of a physical act, esp. a violent act directed against a robbery victim"  
 6 (emphasis added)). And because intentionally or knowingly causing  
 7 physical injury necessarily involves the use of physical force, see  
 8 *United States v. Castleman*, 134 S. Ct. 1405, 1414, 1417 (2014), it  
 9 logically follows that even a defendant who used "fear of injury" to  
 10 commit Hobbs Act Robbery can be said to have "threatened use of physical  
 11 force against the person or property of another." See 18 U.S.C. § 924  
 12 (c)(3)(A).

13 **3. Hobbs Act Robbery in the Ninth Circuit**

14 Perhaps most importantly, Ninth Circuit precedent shows Hobbs Act  
 15 Robbery includes an element of physical force. Contrary to Mr. Campos's  
 16 assertions, *United States v. Mendez* does not hold that Hobbs Act Robbery  
 17 only qualifies as a crime of violence under § 924(c)(3)'s risk-of-force  
 18 clause. See 992 F.2d 1488 (9th Cir. 1993). Instead, *Mendez* held  
 19 *conspiracy* to commit Hobbs Act Robbery qualified as a crime of violence  
 20 under § 924(c)(3)'s risk-of-force clause; it did not address whether

---

21  
 22 <sup>3</sup> The particular language used in the Hobbs Act to define "robbery" gains  
 23 even more significance when contrasted with the Act's companion definition  
 24 of "extortion." For instance, the definition of "robbery" contains words  
 25 such as "taking or obtaining" instead of just "obtaining," "personal  
 26 property" rather than merely "property," and "fear of injury" in lieu of  
 simply "fear." *Cf.* 18 U.S.C. § 1951(a), (b) (emphasis added.)

1 such a *conspiracy* would also fall under the element-of-force clause.  
 2 See *id.* at 1491. Moreover, *Mendez* shows that commission of Hobbs Act  
 3 Robbery qualifies as a crime of violence under § 924(c)(3)'s element-  
 4 of-force clause. The *Mendez* court stated, "Robbery indisputably  
 5 qualifies as a crime of violence," and specifically cited to Hobbs Act  
 6 Robbery as "containing [an] element of 'actual or threatened force, or  
 7 violence.'" *Id.*

8 The bulk of Mr. Campos's arguments were also recently rejected by  
 9 the Ninth Circuit in the unpublished decision *United States v. Howard*,  
 10 2016 WL 2961978, \*2 (9th Cir. May 23, 2016). In *Howard*, the Ninth  
 11 Circuit held that Hobbs Act Robbery is categorically a crime of violence  
 12 under § 924(c)(3)'s element-of-force clause, even if accomplished by  
 13 means of "fear of injury." See *id.* And though the *Howard* court took no  
 14 position on whether Hobbs Act Robbery may be accomplished through a de  
 15 minimis use of force, Mr. Campos has not demonstrated any realistic  
 16 probability that Hobbs Act Robbery could be committed in such a manner.  
 17 See *United States v. Hill*, No. 14-3872-CR, 2016 WL 4120667, at \*4 (2d  
 18 Cir. Aug. 3, 2016) ("[T]here must be 'a realistic probability, not a  
 19 theoretical possibility,' that the statute at issue could be applied to  
 20 conduct that does not constitute a crime of violence." (quoting *Gonzales*  
 21 *v. Duenas-Alvarez*, 549 U.S. 183, 184 (2007))).

22 **4. Hobbs Act Robbery in Other Jurisdictions**

23 Many other jurisdictions also continue to characterize Hobbs Act  
 24 Robbery as a crime of violence under § 924(c), even after *Johnson II*.  
 25 For example, The Second Circuit recently indicated it agreed with the  
 26 Ninth Circuit that Hobbs Act Robbery falls under § 924(c)(3)(A). See

1 *Hill*, 2016 WL 4120667, \*7 (citing *Howard*, 2016 WL 2961978). The Seventh  
 2 Circuit has affirmed the convictions of defendants who pled guilty to  
 3 Hobbs Act Robbery and brandishing a firearm during a crime of violence.  
 4 See *United States v. Ikegwuonu*, No. 15-2407, 2016 WL 3228428 (7th Cir.  
 5 June 13, 2016). The Eighth Circuit has noted more than once that Hobbs  
 6 Act Robbery falls under § 924(c)(3)(A). See, e.g., *United States v.*  
 7 *House*, 825 F.3d 381, 387 (8th Cir. 2016). And, according to the Eleventh  
 8 Circuit, "the substantive offense of Hobbs Act robbery still qualifies  
 9 as a valid companion conviction notwithstanding *Johnson*." *In re Chance*,  
 10 No. 16-13918-J, 2016 WL 4123844, at \*2 (11th Cir. Aug. 2, 2016).

11 Indeed, in *Hill* – a decision this Court finds particularly well-  
 12 reasoned and persuasive – the Second Circuit Court of Appeals rejected  
 13 arguments nearly identical to those made by Mr. Campos. As the court  
 14 in *Hill* noted, even assuming arguendo that *Johnson I* governs "physical  
 15 force" under § 924(c)(3), it "means no more nor less than force capable  
 16 of causing physical pain or injury to a person or injury to property;"  
 17 it encompasses even indirect applications such that it may be  
 18 accomplished by "threatening to poison a victim, rather than to shoot  
 19 him." See *Hill*, 2016 WL 4120667 at \*5-6; see also *United States v.*  
 20 *Castleman*, 134 S. Ct. 1405, 1414 (2014) ("[A]s we explained in *Johnson*  
 21 [*I*], 'physical force' is simply 'force exerted by and through concrete  
 22 bodies,' as opposed to 'intellectual force or emotional force.' And  
 23 the common-law concept of 'force' encompasses even its indirect  
 24 application." (citing *Johnson I*, 559 U.S. at 138)).

25 //

26 /

### III. CONCLUSION

The Court finds that Hobbs Act Robbery under 18 U.S.C. § 1951(b)(1) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," and thus qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A). Therefore, Mr. Campos violated 18 U.S.C. 924(c)(1)(A)(iii) when he discharged a firearm during and in relation to committing Hobbs Act Robbery; his conviction and sentence stand.

Accordingly, IT IS HEREBY ORDERED:

1. Defendant's Motion to Vacate Conviction in Light of *Johnson v. United States*, 135 S. Ct. 2551 (2015) and for Immediate Release, ECF No. 72, is DENIED.

2. This file shall be **CLOSED**.

**IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and provide copies to all counsel, the United States Probation Office, and the United States Marshals Service.

**DATED** this 13<sup>th</sup> day of September 2016.

s/Edward F. Shea  
EDWARD F. SHEA  
Senior United States District Judge